UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, -against- GARY HIRST *et al.*, Defendant.	No. 1:15-CR-00643

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF NON-PARTY LUIS R. MEJIA TO QUASH THE SUBPOENA

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TABLE OF CONTENTS

Page

INTRODUCTION 1
BACKGROUND 1
ARGUMENT 3
CONCLUSION 5

TABLE OF AUTHORITIES

Page(s)

CASES

Cheney v. United States Dist. Ct. for Dist. of Columbia,
542 U.S. 367 (2004)....................4

Hickman v. Taylor,
329 U.S. 495 (1947)....................5

Schaeffler v. United States,
806 F.3d 34 (2d Cir. 2015)....................5

United States v. Adlman,
134 F.3d 1194 (2d Cir.1998)....................5

United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO,
119 F.3d 210 (2d Cir.1997)....................4

United States v. Iozia,
13 F.R.D. 335 (S.D.N.Y. 1952)....................3, 4

United States v. Nixon,
418 U.S. 683, 94 S. Ct. 3090 (1974)....................4

OTHER AUTHORITIES

Fed. R. Civ. P. 26(b)(3)....................5

Fed. R. Crim. Proc. 17(c)....................1, 3, 4

Federal Rule of Criminal Procedure 17(c)(2)....................3

Rule 1.6 of the New York Rules of Professional Conduct....................1

Luis R. Mejia, by and through his counsel Perkins Coie LLP, respectfully submits this memorandum of law pursuant to Fed. R. Crim. Proc. 17(c) in support of his motion to quash the subpoena for documents and testimony issued by Defendant Gary Hirst.

INTRODUCTION

Defendant Hirst has subpoenaed Mr. Mejia, an attorney, for testimony and a single legal memorandum that are both protected by the attorney-client privilege and work product doctrine. Counsel for Defendant Hirst has refused to withdraw the subpoena, even after conceding to this Court that Gerova, the client at issue, has not waived the privilege. Because the legal memorandum and any testimony Mr. Mejia could provide about the memorandum are protected from disclosure by the attorney-client privilege, the subpoena should be quashed.

BACKGROUND

Mr. Mejia is a partner in the Washington, D.C. office of Perkins Coie LLP. Before joining Perkins Coie LLP, Mr. Mejia was a partner with another law firm, DLA Piper. *See* Declaration of Luis R. Mejia in Support of the Motion of Luis R. Mejia to Quash the Subpoena ("Mejia Decl.") at ¶ 2. Mr. Mejia began his employment with DLA Piper in December 2009 and left on January 16, 2014 ("the Relevant Time Period"). Mejia Decl. at ¶ 2. In April 2010, while working at DLA Piper, Mr. Mejia provided legal advice to Gerova Financial Group, Ltd. ("Gerova"). Mejia Decl. at ¶ 2. Outside of the Relevant Time Period, Mr. Mejia has not provided any legal services to Gerova. Mejia Decl. at ¶ 2.

On August 29, 2016, Mr. Mejia was served with a subpoena dated August 16, 2016 ("the Subpoena"), issued by Michael Tremonte, who is the attorney for Defendant Gary Hirst. Mejia Decl. at ¶ 3. The Subpoena requests Mr. Mejia's appearance to testify at a hearing or trial, as well as documents and communications concerning Gerova and Fund.com between January 1, 2008 and the present. Mejia Decl. at ¶ 3. Mr. Mejia has only a single document in his possession that is responsive to the Subpoena, and counsel for Defendant Hirst has stated that he already has a copy of that document. Mejia Decl. at ¶¶ 4, 5. That document is a memorandum dated April 26, 2010 ("the Memorandum") and addressed to Gerova, through its counsel at the time, Defendant Gary Hirst. Mejia Decl. at ¶ 4. The Memorandum provides legal advice on an employment issue, and it contains Mr. Mejia's mental impressions and legal theories. Mejia Decl. at ¶ 4. Moreover, at the time the Memorandum was created, there was a possibility that a third party could challenge the theories in a litigation proceeding. Mejia Decl. at ¶ 4.

Upon receipt of the Subpoena, Mr. Mejia contacted the current counsel for Gerova, Scott Reynolds. Mejia Decl. at ¶ 6. Mr. Reynolds represents Gerova's liquidators and functions as Gerova's officers and directors. Mejia Decl. at ¶ 6. Mr. Reynolds informed Mr. Mejia that Gerova is maintaining its attorney-client privilege and is not waiving the privilege under any circumstances. Mejia Decl. at ¶ 6. At that time, Mr. Mejia also contacted DLA Piper to inform them of the Subpoena and the Memorandum. Mejia Decl. at ¶ 7. DLA Piper requested that Mejia protect its attorney work product from disclosure. Mejia Decl. at ¶ 7.

By letter dated September 1, 2016 ("the September 1st Letter"), Mr. Mejia objected to the Subpoena on the basis of the attorney-client privilege and the work product doctrine. Mejia Decl. at ¶ 8. Mr. Mejia included a privilege log describing the Memorandum, and asked Mr. Tremonte to withdraw the Subpoena. Mejia Decl. at ¶ 8. On September 6, 2016, Mr. Tremonte had a telephone conversation with Mr. Mejia, during which time he refused to withdraw the Subpoena. Mejia Decl. at ¶ 9. Mr. Tremonte said that he believed Gerova had waived the attorney-client privilege when certain documents containing privileged information had been produced by Gerova or its officers and directors. Mejia Decl. at ¶ 9. Mr. Tremonte stated that he already had possession of a copy of the Memorandum, which he said had been provided to him by the Government in a Rule 16 production for this criminal case. Mejia Decl. at ¶ 9. Mr. Tremonte also said he did not know the identity of the original source of the Memorandum, or how it became part of the Government's Rule 16 production. Mejia Decl. at ¶ 9. Finally, Mr. Tremonte said that he wanted Mr. Mejia to testify about the Memorandum, its purpose, and why it was created. Mejia Decl. at ¶ 9. Despite Mr. Tremonte's position, Gerova and DLA Piper continue to assert the attorney-client privilege and attorney work product doctrine. Mejia Decl. at ¶ 10.

On September 8, 2016, based on additional information, Mr. Mejia sent a letter to Mr. Tremonte again requesting that he withdraw the Subpoena. Mejia Decl. at ¶ 11. In particular, Mr. Tremonte submitted a letter motion to the Court the same day stating that "the client, Gerova, has not waived" the attorney-client privilege. *See generally* September 8, 2016 Letter Motion to the Court from Michael Tremonte on behalf of Gary Hirst ("the September 8 Letter Motion"), Docket # 249, at 2-4. Mr. Tremonte further acknowledged to the Court that he had "been informed by the [previous] law firm [for Gerova] and the [G]overnment . . . that the bankruptcy trustee for Gerova has not waived the privilege." *See* September 8 Letter Motion at 3. Despite these admissions, Mr. Tremonte has not responded to Mr. Mejia's letter dated September 8, 2016, nor has he withdrawn the Subpoena. Mejia Decl. at ¶ 12.

ARGUMENT

The Document and Testimony Are Protected from Disclosure by the Attorney-Client Privilege and Work Product Doctrine

Under Federal Rule of Criminal Procedure 17(c)(2), the Court "may quash or modify [a] subpoena if compliance would be unreasonable or oppressive." Fed. R. Crim. P. 17(c); *See also United States v. Iozia*, 13 F.R.D. 335, 338 (S.D.N.Y. 1952) (referring to factors courts consider to determine the reasonableness of a subpoena). Defendants must also show "good cause" before a subpoena is deemed to be valid. *See Iozia,* 13 F.R.D. at 338 (discussed with approval in *United States v. Nixon,* 418 U.S. 683, 699-700, 94 S. Ct. 3090, 3103-04 (1974)). The United States Supreme Court has concluded that the validity of a subpoena under Fed. R. Crim. P. 17(c) is based on the relevancy of documents sought, the specificity with which they are identified, and their admissibility as evidence. *See Cheney v. United States Dist. Ct. for Dist. of Columbia,* 542 U.S. 367, 386 (2004) (citing *Nixon,* 418 U.S. at 699-700).

In this case, compliance with the Subpoena would be unreasonable or oppressive because the information sought is privileged. The attorney-client privilege is applicable: (1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived. *See United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO*, 119 F.3d 210, 214 (2d Cir.1997) (quoting *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983,* 731 F.2d 1032, 1036 (2d Cir.1984)).

Here, Gerova sought legal advice on an employment issue from Mr. Mejia in his capacity as an attorney, and the communication between Gerova and Mr. Mejia was made in confidence. Gerova has not waived the attorney-client privilege, a fact that Defendant Hirst has acknowledged to this Court. In the September 8 Letter Motion, counsel for Defendant Hirst stated "the client, Gerova, has not waived" the attorney-client privilege and further acknowledged that the government's Rule 16 disclosures did not waive Gerova's attorney-client privilege. September 8 Letter Motion, at 2-4. Because the document and testimony sought from Mr. Mejia are protected from disclosure by the attorney-client privilege, the Subpoena should be quashed on that basis.

The Memorandum is also protected from disclosure by the work product doctrine. *Hickman v. Taylor,* 329 U.S. 495, 510–11 (1947); *see also* Fed. R. Civ. P. 26(b)(3). Documents prepared in anticipation of litigation are work product, even when they are also intended to assist in business dealings. *United States v. Adlman,* 134 F.3d 1194, 1202, 1204 (2d Cir.1998) (stating that the work product doctrine "is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategies 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries") (quoting *Hickman v. Taylor,* 329 U.S. at 511); *Schaeffler v. United States*, 806 F.3d 34, 43 (2d Cir. 2015) ("*Adlman* is the governing precedent" regarding documents subject to work-product protection). Without revealing its contents and waiving work-product protection at the time, the Memorandum was prepared, there was a possibility that a third party could challenge the theories in a litigation proceeding. Mejia Decl. at ¶4. Thus, the Memorandum is attorney work-product and is protected from disclosure.[1]

CONCLUSION

For the foregoing reasons, Luis R. Mejia's motion to quash the subpoena for documents and testimony should be granted.

Dated: New York, New York
September 14, 2016

Respectfully submitted,

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[1] Further, Mr. Mejia is bound by Rule 1.6 of the New York Rules of Professional Conduct not to reveal the confidential information of a client.